



December 20, 1999

Ms. Cynthia Milne
Deputy General Counsel
Department of Criminal Justice
P.O. Box 4004
Huntsville, Texas 77342

OR99-3672

Dear Ms. Milne:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129962.

The Texas Department of Criminal Justice ("TDCJ") received a request for nine categories of information regarding TDCJ correctional officer positions. You state that you are in the process of making the information responsive to categories one through eight available to the requestor. However, you question whether you are required to release the information responsive to category nine. Category nine requests "[a]ny and all videotape showing assaults on TDCJ [c]orrectional officers during the most recent three years." You claim that the information responsive to category nine is excepted from disclosure under sections 552.107, 552.108, and 552.131 of the Government Code.¹ We have considered the exceptions you claim and reviewed the videotape that you have submitted as a representative sample of the responsive information.²

¹Although you listed section 552.108 as an exception you deemed applicable in your letter requesting an attorney general decision, you have made no argument explaining the applicability of section 552.108 as required by section 552.301. Therefore, you may not withhold the information under section 552.108.

²The requestor only asks for videotape showing assaults on TDCJ correctional officers. You explain that you are in the process of trying to track down any videotapes that are responsive to this request. In the meantime, you have submitted a videotape showing an incident in which TDCJ correctional officers used force to subdue an inmate. You state that the submitted videotape is "an exemplar of a videotape of an assault on

We begin by noting the manner in which you have raised section 552.131. Section 552.301 required you to state the exceptions you deemed applicable within ten days after receiving the request for information. The submitted request for information indicates that it was received by TDCJ on September 27, 1999. Accordingly, TDCJ had until October 11, 1999 to notify this office of the exceptions it wished to raise. However, it was not until October 18, 1999, that you raised for the first time section 552.131 of the Government Code. Generally, when a governmental body fails to timely raise an exception, the governmental body effectively waives that exception. However, we find section 552.131 is a mandatory exception and consequently, it cannot be waived. *See* Open Records Decision No. 150 (1977) (presumption of openness overcome by a showing that the information is made confidential by another source of law or affects third party interests). Therefore, we consider your argument regarding section 552.131.

Section 552.131(a) relating to TDCJ inmates states:

Except as provided by Subsection (b) or by Section 552.029, information obtained or maintained by the Texas Department of Criminal Justice is excepted from the requirements of Section 552.021 if it is information about an inmate who is confined in a facility operated by or under a contract with the department.

Section 552.029 states:

Notwithstanding . . . Section 552.131, the following information about an inmate who is confined in a facility operated by or under a contract with the Texas Department of Criminal Justice is subject to required disclosure under Section 552.021:

. . .

(8) basic information regarding the death of an inmate in custody, an incident involving the use of force, or an alleged crime involving the inmate.

Section 552.131 is explicitly made subject to section 552.029. Under section 552.029 basic information regarding an incident involving the use of force is subject to required disclosure.

an officer.” We rely on your statement that the submitted videotape is representative of the requested videotape. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

We have reviewed the submitted videotape and find that it does not contain such basic information. Accordingly, TDCJ must withhold the requested videotape under section 552.131.³

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

³As sections 552.029 and 552.131 were recently enacted by the Seventy-sixth Legislature, we find that they supercede our prior analysis of section 552.107(2) in regard to the 1992 court order from *Ruiz v. Collins*, No. H-78-987 (S.D. Tex., filed Dec. 11, 1992). See Act of May 26, 1999, 76th Leg., R.S., ch. 783, § 2, 1999 Tex. Sess. Law Serv. 3407, 3408 (Vernon) (codified at Gov't Code § 552.029); see also *id.* § 1, 1999 Tex. Sess. Law Serv. 3407, 3407-08 (Vernon) (codified at Gov't Code § 552.131). Accordingly, sections 552.029 and 552.131 are dispositive of this matter and we need not address your argument concerning section 552.107(2) and the *Ruiz* order.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "E. Joanna Fitzgerald".

E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF\nc

Ref: ID# 129962

Encl: Submitted documents

cc: Mr. Tony Kovaleski
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